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COURTS RULE ON TUITION REIMBURSEMENT AND RIGHTS OF NONCUSTODIAL PARENTS

Education Alert
June 29, 2009

Practices & Industries

Education

In *Forest Grove*, Supreme Court Opens Door for Private School Tuition Reimbursement

On June 23, 2009, the United States Supreme Court issued a crucial decision clarifying the scope of a parent's right to obtain private school tuition reimbursement under the Individuals with Disabilities Education Act (IDEA). In this decision, *Forest Grove Sch. Dist. v. T.A.*, the court ruled that a parent is entitled to receive private school tuition reimbursement based on allegations that the public school is incapable of properly educating his or her disabled child — even if the child never sets foot into a public school.

The *Forest Grove* case involved an Oregon high school student who struggled for years with his academics. The student's parents suspected that his struggles were due to a learning disability or related impairment, and subsequently asked that the public school district evaluate the student and classify him for special education instruction and services. The Forest Grove school district performed the evaluation and determined that the student did not qualify for special education services. Frustrated with the evaluation process and the school's refusal to classify the student, the parents removed the student from the public school and enrolled him into a private residential school.

The parents then commenced a legal proceeding, seeking reimbursement from Forest Grove for the cost of tuition. During the course of these proceedings, a central issue became paramount — is the parent entitled to private school tuition reimbursement if the student never received special education instruction and services from the school district? The Forest Grove school district responded to this question in the negative, relying on a section of the IDEA that plainly demonstrates that the student must first receive "special education and related services under the authority of a public agency" before a parent has any right to private school tuition reimbursement.

The Supreme Court, however, disagreed with Forest Grove's position. In a 6-to-3 ruling authored by Justice John Paul Stevens, the court ruled that this section is not the exclusive provision under which a parent may obtain private school tuition reimbursement. Rather, the parent may seek this relief under a separate provision of

the IDEA, which authorizes courts to grant "such relief as the court may deem appropriate." Noting that the court has traditionally interpreted the IDEA liberally in terms of the potential relief that a parent may obtain, the court concluded that the latter section of the IDEA affords the parents an avenue to obtain tuition reimbursement, notwithstanding the conditions set forth in the former section. The court concluded:

[The] IDEA authorizes reimbursement for the cost of private special education services when a school district fails to provide a FAPE [free appropriate public education] and the private school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.

The *Forest Grove* decision finally resolves a dispute that has simmered for several years, dating back to a prior Supreme Court matter, *Board of Education of The City School District of The City of New York v. Tom F.*

This decision raises several points of concern for public school districts. Despite the express intent of the IDEA to create a positive and conducive relationship between the school district and the parent, the Forest Grove decision may encourage parents to reject efforts by the public school district to collaboratively develop an educational program, and it could entice parents to increase litigation against public schools in an attempt to obtain a private school education at taxpayer cost. This litigation is also troubling to the degree that it forces the school district to defend an educational program it was never afforded a chance to provide to the student. Thus, the public school district's defense of its recommendations can only be based on theory — what it *thinks* will help the student obtain educational benefit, as opposed to what *is* providing educational benefit.

While these concerns are significant, they are not cause for immediate panic. Public school districts can be comforted with the knowledge that the strict standards to obtain tuition reimbursement are still in place. Courts have generally been hesitant to award tuition reimbursement, and they will only do so in clear instances where the public school program is deficient. As long as public school districts continue to strive to provide solid, reasonable educational programs, they will continue to stave off tuition reimbursement claims.

In the *Fuentes* Decisions, the Courts Slash the Rights of Noncustodial Parents

The IDEA gives many procedural and substantive rights to the parents of special education students. One of the most powerful parental rights under the IDEA is the right to challenge just about any action taken by a school district in connection with their child's educational program and services. A parent initiates such a challenge by requesting an impartial due process hearing. If the parent is not satisfied with the outcome of the hearing, he or she may commence a lawsuit in state or federal court.

But for noncustodial parents of special education students, things have changed. Recently, two high courts in New York issued decisions that effectively ended the right of a noncustodial parent to bring a challenge under the IDEA. However, as explained below, the impact of these decisions will go well beyond the right to raise a claim.

Fuentes v. Board of Education of the City of New York was pending before the Second Circuit Court of Appeals, a federal appellate court with jurisdiction over New York. At issue in *Fuentes* was whether a noncustodial parent had the right to raise a claim as a "parent" under the IDEA. Although the IDEA is a federal statute, the Second Circuit looked to state law for guidance — specifically whether, under New York law, a noncustodial parent has the right to make decisions about his or her child's education. Since there was no definitive law in New York, the Second Circuit requested that our state's highest court, the New York Court of Appeals, rule on that issue.

Upon review, the Court of Appeals ruled that in New York, a noncustodial parent does not have the right to control educational decisions for his or her child. The court did carve out one exception — a noncustodial parent is afforded the right to control educational decisions if, and only if, that right is expressly included in a custody order. The case then returned to the Second Circuit. Upon review of the Court of Appeals' decision, the Second Circuit ruled that absent supporting language in a custody order, a noncustodial parent lacked standing to bring a claim under the IDEA. The Second Circuit's rationale was simple and straightforward: since the purpose of a parent raising a challenge under the IDEA is to assert control over his or her child's educational program, the right to raise such a challenge should not extend to noncustodial parents. So, based on the *Fuentes* decisions, going forward, we now know that only two categories of parents may raise a claim under the IDEA: (i) parents with custody over their child; and (ii) noncustodial parents whose custody order expressly grants them the right to control or make educational decisions.

The impact of the *Fuentes* decisions will go well beyond the right to raise a claim under the IDEA. For example, the decisions appear to have changed the rules governing who may provide consent under the IDEA for, among other things, an initial evaluation, reevaluation, or the provision of special education services. Under the IDEA, consent for the above activities must be provided by one of the student's parents. As such, it has been well-settled that both custodial and noncustodial parents could provide consent. The *Fuentes* decisions have presumably changed this rule because the decision to provide consent for a CSE- or CPSE-related activity appears to be an education-related decision designated exclusively to custodial parents (absent contrary language in a custody order).

While the impact of the *Fuentes* decisions on the parental consent rules appears to be clear, the status of other rules is, to say the least, in flux. To illustrate, it is unclear whether school districts are still obligated to invite noncustodial parents to CSE or CPSE meetings. At first glance, the *Fuentes* decisions, especially the Court of Appeals' ruling, appear to indicate that noncustodial parents still have the right to participate in the CSE or CPSE process. Indeed, the Court of Appeals went so far as to encourage such participation. But the Court of Appeals failed to definitively state the extent to which noncustodial parents have the right to participate. Instead, the court merely stated nothing prevents noncustodial parents from "requesting information about, keeping apprised of, or otherwise remaining interested in the[ir] child's educational progress."

A further analysis of the right-to-participate issue raises several questions. If noncustodial parents still have the right to participate, what is their role or purpose at the meeting based on their lack of decision-making authority? Also, assuming noncustodial parents have the right to attend meetings, how can they enforce that right if the school district fails to invite them? Under the Fuentes decisions, a noncustodial parent cannot raise a claim under the IDEA, so presumably a noncustodial parent cannot initiate an impartial due process hearing on this ground. If that is not the case, then the courts

(or our legislature) will need to carve out several parent-based rights, such as the right to receive notice and attend meetings, that noncustodial parents can enforce at an impartial due process hearing. We will monitor these issues and, of course, keep you updated. For now, we recommend the following:

- First, when dealing with a special education student whose parents are divorced or legally separated, request a copy the custody order.
- Second, when parental consent is required for a CSE or CPSE function, obtain consent from the custodial parent or the noncustodial parent, if, and only if, the custody order grants that individual decision-making authority on education matters.
- Third, to be safe for now, continue to invite both custodial and noncustodial parents to CSE or CPSE meetings. Also, continue to send prior written notice, when required under the law, to both custodial and noncustodial parents. If a noncustodial parent raises a claim, your district can request its dismissal under the *Fuentes* decisions.

If you have questions about how either of these developments may affect your school — or about any other special education-related issue — please contact a member of our special education team listed below. We will discuss these and many other cutting-edge issues facing school districts today at our next Special Education Update seminar, which will be held October 1.

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